

**Naz Foundation v. Government of NCT of Delhi and Others: A Critical Analysis
from the Constitutional Perspective
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INTRODUCTION

The Delhi High Court recently in *Naz Foundation v. Government of NCT of Delhi and Others*¹ produced a memorable judgment declaring Section 377 of the Indian Penal Code constitutionally invalid. Eminent Jurist Ram Jethmalani points out that Lord Macaulay and his fellow commissioners who framed that code had presumably not taken Bentham's teachings (quoted above) seriously, at least when they introduced their notion of Victorian morality into this section.²

There is a need to balance "popular or public morality" vis- a- vis "constitutional morality" and how far the Delhi High Court has been successful in striking a balance between these competing interests merits close analysis and this is an issue that informs much of the discussion in this article.

THE NAZ FOUNDATION JUDGMENT: A CASE STUDY

This writ petition was preferred by Naz Foundation, a Non Governmental Organisation (NGO) as a Public Interest Litigation to challenge the constitutional validity of Section 377³ of the Indian Penal Code, 1860 (IPC), which criminally penalizes what is described as "unnatural offences", to the extent the said provision criminalises consensual sexual acts between adults in private.⁴

According to Petitioner NGO and those who supported the petition Homosexual and such other people represents population segment that is extremely vulnerable to HIV/AIDS infections. According to them the HIV/AIDS preventive efforts were severally impaired by the discriminatory attitudes of the State Agency towards homo – sexuality as the same is covered under section 377 of IPC, as a result of which basic

¹ WP (C) No. 7455/ 2001. Date of decision: 2nd July, 2009

² 'Who's afraid of homosexuality?', *The Indian Express*, 22 July, 2009.

³ **S. 377 Unnatural Offences** - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offence.

⁴ The Writ Petition was earlier dismissed by the Delhi High Court in 2004 on the ground that there is no cause of action in favour of the Petitioner and that such a Petition cannot be entertained to explain the academic challenge to the constitutionality of the legislation. The Supreme Court with a order dated 3rd February, 2006 set aside the said order of Delhi High Court observing that the matter does require the consideration and is not of a nature which could be dismissed on the aforesaid ground.

fundamental Human right of such groups (in minority) stood denied and they were subject to abuse, harassment, and assault from public and public authorities.⁵ The Petitioner also contended that the said section to the extent of their application violates the section 14, 15, 19 (1) (a) (b) (c) and (d) and Article 21 of the Constitution of India and thus consensual sexual intercourse between two willing adult in private is required to be saved and excepted from the panel provision contained in section 377 of IPC.⁶

As for the Union of India was concerned in this particular case⁷, it argued that the said section has been generally invoked in cases of child sexually abuse and for complementary lacunae in rape laws and not mere home sexuality. It also placed reliance upon the 42nd report of law commission of India wherein it the Commission had justified that Indian society still considers homo-sexuality as a criminal offence.⁸

HIGH COURT VIEW

The Hon'ble High Court held that Section 377 of IPC infringes Articles 14, 15 and 21 of the Constitution of India to the extent it criminalizes consensual sexual Acts of Adults in Private. The Hon'ble High court did not deal with violation of Article 19(1) (a) to (d) and that issue has been left open. Section 377 IPC grossly violates their right to privacy and liberty embodied in Article 21 insofar as it criminalizes consensual sexual acts between adults in private. The Hon'ble Court has further held that if the penal clause is not being enforced against homosexuals engaged in consensual acts within privacy, it only implies that this provision is not deemed essential for the protection of morals or public health vis-à-vis said section of society. The provision, from this perspective, should fail the "reasonableness" test. The Court commenting upon Article 15 held that sexual orientation is a ground analogous to sex, and that

⁵ *Supra* note 1. Para 6

⁶ *Ibid.* Para 9

⁷ In this particular case the Ministry of Home affairs and Ministry of Health and family welfare had taken contradictory stands as is clear from the affidavit filed by two wings of Union of India. The Ministry of Home affairs sought to justify the retention of section 377 of IPC, whereas ministry of Health and Family insisted that continuance of section 377 of IPC has hampered the HIV/AIDS prevention efforts.

⁸ In the 172nd report, the Law Commission has recommended deletion of Section 377 IPC, though in the 42nd report it had recommended the retention of the provision. In the 172nd report, the Law Commission of India, focused on the need to review the sexual offences laws in the light of increased incidents of custodial rape and crime of sexual abuse against youngsters, and inter alia, recommended deleting the section 377 IPC by effecting the recommended amendments in Sections 375 to 376E of IPC.

discrimination on sexual orientation is not permitted under Article 15. The Hon'ble High Court held that right to life & protection of a person's dignity, autonomy and privacy is covered by Article 21 of the Constitution of India. S. 377 of IPC is an infringement of the right to dignity and privacy.

DECIPHERING THE JUDGMENT

Before going into the merits of the judgment, one need not forget that Section 377, which punishes "carnal intercourse against the order of nature" with imprisonment up to 10 years, is not specifically targeted at homosexuality. But by criminalising any penetrative sex that does not lead to reproduction, it has become a weapon in the hands of the police to harass those who have alternative sexual orientations.⁹ The Delhi high court judgment is full of learning and references to literature on psychiatry, genetics, religion and judgments delivered in other jurisdictions, particularly the US and Canada. It refers to the report of the British Wolfenden Committee and the Sexual Offences Act, 1967, by which English law decriminalised homosexuality. It fortifies its conclusions by the 172nd report of the Law Commission which also took the same view: 'Section 377 in its present form has to go'. The Delhi high court judgment is substantially based upon the citizen's right to privacy and a life of dignity. The court correctly concluded that these rights can only be subordinated to some overriding public interest. The submission was in the teeth of the view of the American Psychiatric Association presented to the United States Supreme Court in 2002 in the case of *Lawrence v. Texas*:

"According to current scientific and professional understanding, however, the core feelings and attractions that form the basis for adult sexual orientation typically emerge between middle childhood and early adolescence. Moreover, these patterns of sexual attraction generally arise without any prior sexual experience. Thus, homosexuality is not a disease or mental illness that needs to be, or can be, 'cured' or 'altered', it is just another expression of human sexuality". The Delhi Judgment does not recommend homosexuality or even approve of it. But it is obnoxious arrogance to claim that my conduct is natural while others violate nature. The Constitution of India does not tolerate such tyranny.¹⁰

⁹ URL: <http://www.hindu.com/2009/07/01/stories/2009070155550800.htm>, accessed on 22- 09- 2009

¹⁰ *Supra* note 2

Hon'ble High Court held that if a court finds that a claimed right is entitled to protection as a fundamental privacy right, the law infringing it must satisfy the "compelling state interest test". While it could be "a compelling state interest" to regulate by law, the area for the protection of children and others incapable of giving a valid consent or the area of non-consensual sex, enforcement of public morality does not amount to a "compelling state interest" to justify invasion of the zone of privacy of adult homosexuals engaged in consensual sex in private without intending to cause harm to each other or others. Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly.¹¹

CONCLUSION

The notion of equality in the Indian Constitution flows from the 'Objective Resolution' moved by Pandit Jawaharlal Nehru on December 13, 1946. Nehru, in his speech, moving this Resolution wished that the House should consider the Resolution not in a spirit of narrow legal wording, but rather look at the spirit behind that Resolution. He said, "Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion..... (The Resolution) seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future."¹² If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognizing a role in society for everyone. Those perceived by the majority as "deviants" or 'different' are not on that score excluded or ostracized. Where society can display inclusiveness and understanding, such persons can be assured of a

¹¹ URL: <http://www.indiaproposes.com/articlepage.php?arcId=2>, accessed on 22- 09- 2009

¹² Constituent Assembly Debates: Lok Sabha Secretariat, New Delhi: 1999, Vol. I, pages 57-65

life of dignity and non-discrimination. This was the “spirit behind the Resolution” of which Nehru spoke so passionately.

To Conclude:

The authors are of the opinion that in an age where there is growing acceptance of the idea that LGBTs (lesbian, gay, bisexual, transgendered) must be allowed to live in dignity and respect, it is shame that India cannot bring itself to legalise gay behaviour. According to the authors S. 377 should be suitably amended so that it does not include sexual acts between consenting adults in private.

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